

Charter Management, Incorporated and Ten Four, Inc., and Retail Clerks Local #1063, Chartered by the United Food & Commercial Workers International Union, AFL-CIO, CLC. Case 10-CA-18938(E)

11 July 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 13 February 1984 Administrative Law Judge Lawrence W. Cullen issued the attached supplemental decision. The Applicants, Charter Management, Incorporated and Ten Four, Inc. filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The application of the Applicants for an award under the Equal Access to Justice Act is dismissed.

¹ We agree with the judge that the General Counsel presented evidence which if credited would have constituted a prima facie case of 8(a)(3) discrimination. As to the Respondent's knowledge of its employees' union activity it is undisputed that the discharges did not begin until several days after the Union's organizing director and eight employees made a demand for recognition on 25 January 1983. We note that it was only through credibility resolutions adverse to the General Counsel's case that the judge found that the decision to discharge the alleged discriminatees was made prior to 25 January. Further, as pointed out by the judge, the element of union animus could have been established if the judge had credited Carol Byerly with respect to an alleged unlawful interrogation on 25 January and Marcella Branch with respect to an alleged threat on 26 January. For these reasons we agree with the judge that the General Counsel's position with respect to both the 8(a)(3) issue and the independent 8(a)(1) issues was substantially justified within the meaning of Sec. 102.144(a) of the Board's Rules and Regulations.

SUPPLEMENTAL DECISION

LAWRENCE W. CULLEN, Administrative Law Judge. On September 13, 1983, I issued a decision in this case wherein the complaint was dismissed in its entirety. Specifically, I found and concluded that Respondents had not unlawfully interrogated employee Carol Byerly in violation of Section 8(a)(1) of the Act, and that Respondents had not issued a threat to employee Marcella Branch in violation of Section 8(a)(1) of the Act. I further found that the General Counsel had failed to establish a prima facie case of a violation of Section 8(a)(3) of the Act by Respondents' discharge of its employees

Carolyn Boswell, Marcella Branch, Shirley Ann Burns, Carol Ann Byerly, Ellen Leona Davis, Edward Drew Garner, Candice Hunter, James Daniel Loftin, Christine S. McGarity, Darlene Pelham, Betty Jean Payton, and Jacqueline Denise Smith. I further found that, assuming, arguendo, that a prima facie case had been established, Respondents had demonstrated by a preponderance of the evidence that the discharges would have occurred even in the absence of the engagement in union activities by the aforesaid employees. I further found that the General Counsel had failed to establish a violation of Section 8(a)(5) of the Act. No exceptions to the decision were filed and the decision was adopted by the Board on October 19, 1983. Respondents (Applicants) filed their application for attorneys fees and expenses on November 18, 1983, and this matter was referred to me for appropriate action on November 22, 1983. Applicants in their application contend that the General Counsel was not substantially justified in the issuance of the complaint and litigation of the case as all evidence and information presented by Applicants at the hearing was furnished to the General Counsel in the course of the precomplaint investigation of this proceeding, and that, on the basis of this, the General Counsel could and should have determined that no violations of the Act by Applicants had occurred. Applicants seek an award of \$58,642.50 in fees and \$770.03 in expenses allegedly incurred by them in the defense of the case and in making this application.

The General Counsel filed his motion to dismiss the petition on December 9, 1983. Applicants filed their reply to the General Counsel's motion to dismiss the petition on December 23, 1983. The General Counsel contends his motion that the application should be dismissed as it does not set forth sufficient information to establish that Applicants meet all the eligibility requirements of the Equal Access to Justice Act and that the General Counsel was substantially justified in litigating the 8(a)(1) and (3) allegations in the complaint.

I find on the basis of the evidence presented at the hearing that the General Counsel was substantially justified in issuing the complaint and litigating the case to conclusion.

The circumstances of this case raised several issues of credibility concerning whether unlawful interrogation and threats had been made by Respondents, whether there was indeed a union campaign or whether it was merely a response to perceived impending discharge by the employees, whether the employees were involved in taking items of merchandise with or without permission or had otherwise violated Respondents' rules, a determination as to the significance of the timing of the investigation of Respondents of shortages in inventory and merchandise, the advent of the alleged union campaign, and the discharges of the employees as the timing bore on the issues as to whether the discharges were discriminatorily motivated. The determination of these issues was made after a 4-day hearing involving multiple witnesses and conflicting testimony.

These issues were properly resolved in a hearing wherein the witnesses were examined under oath and subject to cross-examination before an administrative law

judge. The determination of these issues involved careful review of their testimony and specific determinations thereof. Moreover, it is clear that, if the testimony of Byerly and Branch had been credited, violations of Section 8(a)(1) of the Act would have been found and a finding of union animus would have been sufficient to establish a prima facie case that the discharges were violative of the Act. *Jim's Big M*, 266 NLRB 665 (1983). Further, under the circumstances of this case it was only after a determination had been made that Respondents had not violated the Act by the alleged interrogation, threat, and discharges that I concluded that Respondents

had a basis for a good-faith doubt concerning the existence of a majority of the employees in support of the Union and had not violated Section 8(a)(5) of the Act by its refusal to recognize the Union.

I accordingly find that the application should be denied as the General Counsel's actions in issuing the complaint and prosecuting this case to conclusion were substantially justified.

ORDER

Applicants' application is denied.